



## **DEPARTMENT OF TRANSPORTATION**

**4910-9X**

### **Office of the Secretary**

#### **49 CFR Part 7**

#### **RIN 2105-AE62**

### **Updates to Comply with the FOIA Improvement Act of 2016 and other Technical Amendments**

**AGENCY:** Office of the Secretary (OST), Department of Transportation (DOT).

**ACTION:** Final Rule.

**SUMMARY:** This final rule updates the Department of Transportation's regulations prescribing procedures for the public availability of information to conform these procedures with amendments to the Freedom of Information Act enacted by the FOIA Improvement Act of 2016. This rule also removes a reference to the Surface Transportation Board, as it has been made a separate agency, outside of the Department, under the Surface Transportation Board Reauthorization Act of 2015. Finally, this rule makes a technical amendment to the Department's submitter notice process to include a reference to the Federal Motor Carrier Safety Administration's updated procedures related to the submission of confidential business information.

**DATES:** This final rule is effective **[INSERT DATE 30 DAYS AFTER**

**PUBLICATION IN THE FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** Claire McKenna, Senior Attorney, Office of the General Counsel, U.S. Department of Transportation, Washington, DC, at [claire.mckenna@dot.gov](mailto:claire.mckenna@dot.gov) or (202) 366-0365.

**SUPPLEMENTARY INFORMATION:**

## **Electronic Access and Filing**

This document may be viewed online through the Federal eRulemaking portal at <https://www.regulations.gov>. Retrieval help and guidelines are available on the Web site. It is available 24 hours each day, 365 days a year. An electronic copy of this document may also be downloaded from the Office of the Federal Register home page at: <https://www.ofr.gov> and the Government Printing Office Web page at: <https://www.gpo.gov>.

### **I. Purpose of the Regulatory Action**

The United States Department of Transportation (Department or DOT) is issuing this final rule to update the Department's regulations prescribing procedures for the public availability of information to conform these procedures with recent amendments to the Freedom of Information Act (FOIA) enacted in the FOIA Improvement Act of 2016, P.L. 114-185. This rule also makes technical amendments to 49 CFR part 7.

The rule revises the definition of "reading room records" in section 7.2 to remove the discussion of the locations of reading room records. The location of reading room records is already provided in section 7.12(b), therefore, this is not a substantive change. As required by the section 2 of the FOIA Improvement Act of 2016, this rule also revises the description of "Frequently Requested Records" in section 7.12(a)(4) to include records requested three or more times under FOIA. The FOIA Improvement Act of 2016 no longer requires that agencies maintain physical locations for the reading rooms. The rule revises the description of reading room locations in section 7.12(b) to indicate that DOT may continue to maintain physical reading rooms (although not required) and, if it

does, those locations will be listed on the Department's FOIA website ([www.transportation.gov/foia](http://www.transportation.gov/foia)).

In section 7.23, the rule amends subparagraph (c)(5) to state that Exemption 5's deliberative process privilege applies only to records created 25 years or more before the date on which the records are requested, and the rule adds a new paragraph (d) to prohibit DOT from withholding information under this section unless DOT reasonably foresees that disclosure will harm an interest protected by a FOIA exemption, or the disclosure is prohibited by law. Both of these changes are required by the FOIA Improvement Act of 2016.

Several additions have been made to section 7.31 in Subpart D, "Time Limits," to align with changes required by the FOIA Improvement Act of 2016, including requirements that DOT notify FOIA requesters of the availability of assistance or dispute resolution services from DOT's FOIA Public Liaisons or the Office of Government Information Services. This rule also extends the amount of time requesters have to file an administrative appeal from 45 days to 90 days from the date of DOT's initial determination. Finally, the rule amends section 7.34 in subpart D, "Fees", to prohibit the Department from charging requesters for the time spent searching for responsive records if the agency misses a deadline. The Department may continue to charge for search time if there are unusual circumstances and the Department responds within thirty days of the date of the request (and has notified the requester of the unusual circumstances). The Department may also continue to charge for search time if: (1) there are unusual circumstances, (2) the requester has been so notified, (3) more than 5000 pages are

necessary in the response, and (4) the agency communicates or makes at least three good faith attempts to address the scope with the requester in an attempt to narrow the request. If a court determines that exceptional circumstances exist, the agency's failure to comply with time limits shall be excused for the length of time provided by court order.

In addition to the changes to the Department's regulations required by the FOIA Improvement Act of 2016, this final rule makes several other technical amendments needed as the result of legislative or regulatory action since the Department's last update to its regulations at 49 CFR part 7, in 2014. First, the Department is updating any reference to the Department's web address to replace "dot" with "transportation" to reflect a change in the Department's web address. Next, this rule removes the reference to the Surface Transportation Board in Section 7.2, "Definitions." The Surface Transportation Board was previously part of DOT, but was made a separate, independent agency, in December 2015, under the Surface Transportation Board Reauthorization Act of 2015 (P.L. 114-110). Finally, this rule amends Section 7.29 to include a reference to information submitted to the Federal Motor Carrier Safety Administration under 49 CFR 389.9. Section 7.29 sets forth the procedures the Department follows when it receives a request for information submitted to the Department that may contain confidential business information; however, these procedures do not apply when confidential business information is submitted to the Department through other regulatory procedures, such as 49 CFR 389.9, that include the opportunity for the submitter to identify the information as confidential and the Department to make a determination about the confidential nature of the information.

## **FINAL RULE**

Under the Administrative Procedure Act (5 U.S.C. 553(b)), the normal notice and comment procedure does not apply if the agency finds that it would be impracticable, unnecessary, or contrary to the public interest. This rule amends 49 CFR part 7 to make minor technical amendments, and revisions directly and expressly mandated by the FOIA Improvement Act of 2016. Additional changes are merely technical amendments that conform the Department's regulations with recent changes made by regulation or legislation. These changes to part 7 do not involve the exercise of agency discretion. Therefore, the Department finds that notice and comment for this rule is unnecessary due to the technical nature of the revisions and the lack of agency discretion. 5 U.S.C. 553(b)(3)(B).

## **RULEMAKING ANALYSES AND NOTICES**

### **Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures**

The Department has determined this action is not a significant regulatory action within the meaning of Executive Order 12866, and within the meaning of the Department of Transportation's regulatory policies and procedures. The Department anticipates that the economic impact of this rulemaking would be minimal.

### **Regulatory Flexibility Act**

The Department has found under 5 U.S.C. 553(b)(3)(B) that notice and opportunity for comment are unnecessary for this rule; therefore, the provisions of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601- 612) do not apply.

### **Assistance to Small Entities**

Section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 is applicable to assist small entities in understanding this final rule so that they can better evaluate its effects on themselves and participate in the rulemaking initiative. If the final rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult Joe Solomey, Senior Counsel for Enforcement Programs, (202) 366-2934.

### **Unfunded Mandates Reform Act of 1995**

This final rule does not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48, March 22, 1995) as it will not result in the expenditure by State, local, tribal governments, in the aggregate, or by the private sector, of \$155 million or more in any one year (2 U.S.C. 1532).

### **Executive Order 13132 (Federalism Assessment)**

Executive Order 13132 requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This action has been analyzed in accordance with the

principles and criteria contained in Executive Order 13132 dated August 4, 1999, and the Department determined this action will not have a substantial direct effect or sufficient federalism implications on the States. The Department also determined this action will not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions.

#### **Executive Order 12372 (Intergovernmental Review)**

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs do not apply to this program.

#### **Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, et seq.), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The Department analyzed this final rule under the PRA and determined this rule does not contain collection of information requirements for the purposes of the PRA.

#### **National Environmental Policy Act**

Agencies are required to adopt implementing procedures for NEPA that establish specific criteria for, and identification of, three classes of actions: those that normally require preparation of an Environmental Impact Statement; those that normally require preparation of an Environmental Assessment; and those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). The changes in this rule are part of agency procedures, and therefore establishing the changes does not require preparation of a NEPA analysis or document. Agency NEPA procedures are generally procedural

guidance to assist agencies in the fulfillment of agency responsibilities under NEPA, but are not the agency's final determination of what level of NEPA analysis is required for a particular proposed action. The requirements for establishing agency NEPA procedures are set forth at 40 CFR 1505.1 and 1507.3.

This action was also analyzed under the Clean Air Act, as amended (CAA), section 176(c) (42 U.S.C. 7401 *et seq.*), and implementing regulations promulgated by the Environmental Protection Agency. Approval of this action is exempt from the CAA's general conformity requirement because it does not affect direct or indirect emissions of criteria pollutants.

#### **Executive Order 12898 (Environmental Justice)**

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a), 91 FR 27534 (May 10, 2012) (available online at [www.fhwa.dot.gov/environment/environmental\\_justice/ej\\_at\\_dot/order\\_56102a/index.cfm](http://www.fhwa.dot.gov/environment/environmental_justice/ej_at_dot/order_56102a/index.cfm)), require the Department to achieve environmental justice (EJ) as part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of its programs, policies, and activities on minority populations and low-income populations in the United States. The DOT Order requires the Department to address compliance with the Executive Order and the DOT Order in all rulemaking activities. In addition, the Department has issued additional documents relating to administration of the Executive Order and the DOT Order.



At the time the Department applies the NEPA implementing procedures in 23 CFR part 771, the Department would have an independent obligation to conduct an evaluation of the proposed action under the applicable EJ orders and guidance to determine whether the proposed action has the potential for EJ effects. The Department has evaluated the environmental justice effects of this rule in accordance with the E.O. and has determined that no environmental justice issue is associated with this rule, nor is there any collective environmental impact that would result from its promulgation.

**Executive Order 12630 (Taking of Private Property)**

The Department has analyzed this final rule under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, and found this final rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630.

**Privacy**

The E-Government Act of 2002, Pub. L. 107-347, sec. 208, 116 Stat. 2899, 2921 (Dec. 17, 2002), requires Federal agencies to conduct a privacy impact assessment for new or substantially changed technology that collects, maintains, or disseminates information in an identifiable form. No new or substantially changed technology would collect, maintain, or disseminate information as a result of this rule.

**Executive Order 12988 (Civil Justice Reform)**

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

**Executive Order 13045 (Protection of Children)**

The Department analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks, which requires agencies issuing “economically significant” rules, if the regulation also concerns an environmental health or safety risk that an agency has reason to believe may disproportionately affect children, to include an evaluation of the regulation’s environmental health and safety effects on children. It was determined this final rule is not economically significant, thus no analysis of the impacts on children is required. There is also no anticipation that this action could present an environmental or safety risk that could disproportionately affect children.

**Executive Order 13175 (Tribal Consultation)**

The Department has analyzed this action under Executive Order 13175, dated November 6, 2000, and determined the action will not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibility between the Federal Government and Indian tribes.

**National Technology Transfer and Advancement Act (Technical Standards)**

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through OMB, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) are standards that are developed or adopted by voluntary consensus standards bodies. This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

#### **Executive Order 13211 (Energy Effects)**

The Department has analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. The Department determined this rule is not a significant energy action under that order because it is not a significant regulatory action under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

#### **Regulation Identification Number**

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

## List of Subjects in 49 CFR Part 7

Freedom of information, Reporting and recordkeeping requirements.

In consideration of the foregoing, the DOT amends 49 CFR part 7 as follows:

### PART 7- PUBLIC AVAILABILITY OF INFORMATION

1. The authority citation for part 7 continues to read as follows:

**Authority:** 5 U.S.C. 552; 31 U.S.C. 9701; 49 U.S.C. 322; E.O. 12600; E.O.

13392

2. Amend § 7.2 by revising the definitions of “*Department or DOT*” and “*Reading room records*” to read as follows:

#### §7.2 Definitions.

\* \* \* \* \*

*Department or DOT* means the Department of Transportation, including the Office of the Secretary, the Office of Inspector General, and all DOT Operating Administrations, any of which may be referred to as a DOT component.

\* \* \* \* \*

*Reading room records* are those records required to be made available to the public without a specific request under 5 U.S.C. 552(a)(2), as described in § 7.12.

\* \* \* \* \*

3. Amend § 7.12 by revising paragraphs (a)(4) and (b) to read as follows:

#### §7.12 What records are available in reading rooms, and how are they accessed?

(a) \* \* \*

(4) Copies of all records, regardless of form or format, that have been released to any person under subpart C of this part and that:

(i) Because of the nature of their subject matter, DOT determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(ii) Have been requested three or more times.

\* \* \* \* \*

(b) *Reading room locations.* DOT makes its reading room records and indices (in the form of lists or links) available at <https://www.transportation.gov/foia>. To the extent that DOT continues to make reading rooms available at a physical location, those locations are listed on the DOT FOIA website at <https://www.transportation.gov/foia>.

4. Amend § 7.23 as follows:

- a. Revise paragraph (c)(5);
- b. Redesignate paragraph (d) as (e);
- c. Add new paragraph (d); and
- d. Add paragraph (f).

The revision and additions read as follows:

**§7.23 What limitations apply to disclosure?**

\* \* \* \* \*

(c) \* \* \*

(5) Inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

\* \* \* \* \*

(d) *Application of exemptions.* DOT shall withhold information pursuant to a statutory exemption only if:

(1) DOT reasonably foresees that disclosure would harm an interest protected by an exemption under paragraph (c) of this section; or

(2) Disclosure is prohibited by law or otherwise exempted from disclosure under paragraph (c)(3) of this section.

\* \* \* \* \*

(f) *Non-confidentiality of requests.* DOT releases the names of FOIA requesters and descriptions of the records they have sought, as shown on DOT FOIA logs, except to the extent that an exemption authorizes or requires withholding of the log information.

5. Amend § 7.27 to revise paragraphs (a) introductory text and (c) to read as follows:

**§7.27 What are the designated DOT FOIA Requester Service Centers?**

(a) A request for a record under this subpart may be submitted via paper, facsimile, or electronic mail to the FOIA Requester Service Center designated for the DOT component where the records are located, at the electronic mail addresses or facsimile numbers identified at <https://www.transportation.gov/foia> or the mailing addresses indicated below (unless a more up-to-date mailing address has been designated at <https://www.transportation.gov/foia>):

\* \* \* \* \*

(c) Requests for records under this part, and FOIA inquiries generally, may be made by accessing the DOT Home Page on the Internet (<https://www.transportation.gov>) and clicking on the Freedom of Information Act link (<https://www.transportation.gov/foia>).

6. Add paragraph (d)(3) to § 7.29 to read as follows:

**§7.29 When and how does DOT consult with submitters of commercial information?**

\* \* \* \* \*

(d) \* \* \*

(3) Information submitted to the Federal Motor Carrier Safety Administration and addressed in 49 CFR 389.9.

\* \* \* \* \*

7. Revise paragraph § 7.31(a)(3) to read as follows:

**§7.31 What time limits apply to DOT with respect to initial determinations?**

(a) \* \* \*

(3) DOT notifies the requester of DOT's initial determination. If DOT decides to grant the request in full or in part, DOT makes the record (or the granted part) available as promptly as possible and provides the requester with written notification of DOT's determination, the reasons for the determination, and the right of the requester to seek assistance from the FOIA Public Liaison. If DOT denies the request in full or in part, because the record (or the denied part) is subject to an exemption, is not within DOT's custody and control, or was not located following a reasonable search, DOT notifies the requester of the denial in writing and includes in the notice the reason for the determination, the right of the requester to appeal the determination, the name and title of each individual responsible for the initial determination to deny the request, and the requester's right to seek dispute resolution services from the FOIA Public Liaison or the Office of Government Information Services. The denial letter includes an estimate of the volume of records or information withheld, in number of pages or other



reasonable form of estimation. This estimate does not need to be provided if the volume is otherwise indicated through deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption. DOT marks or annotates records disclosed in part to show both the amount and location of the information deleted whenever practicable (see § 7.23(d)).

\* \* \* \* \*

8. Amend § 7.32 by revising paragraphs (a), (b), and (c) and (d)(1) to read as follows:

**§7.32 What time limits apply to a requester when appealing DOT's initial or final determination?**

(a) *Denial of records request.* When the responsible DOT official determines that a record request will be denied, in whole or in part, because the record is subject to an exemption, is not in DOT's custody and control, or was not located following a reasonable search, DOT provides the requester with the written statement described in § 7.31(a)(3).

(b) *Denial of fee waiver.* When the responsible DOT official denies, in whole or in part, a request for a waiver of fees made pursuant to § 7.24(b) or § 7.43(c), DOT provides the requester with written notification of that determination, the reasons for the determination, the right of the requester to appeal the determination within DOT, and the requester's right to seek assistance in

resolution of disputes from the FOIA Public Liaison or Office of Government Information Services.

(c) *Denial of expedited processing.* When the responsible DOT official denies a request for expedited processing made pursuant to § 7.31(c), DOT provides the requester with written notice of that determination, the reasons for the determination, the right to appeal the determination within DOT, and the requester's right to seek dispute resolution services from the FOIA Public Liaison or Office of Government Information Services.

(d) \* \* \*

(1) Each appeal must be made in writing to the appropriate DOT appeal official and postmarked or, in the case of electronic or facsimile transmissions transmitted, within ninety calendar days from the date the initial determination is signed and should include the DOT file or reference number assigned to the request and all information and arguments relied upon by the person making the request. The contact information for all DOT component appeal officials is identified in the DOT FOIA Reference Guide available at <https://www.transportation.gov/foia>. The envelope in which a mailed appeal is sent or the subject line of an appeal sent electronically or by facsimile should be prominently marked: "FOIA Appeal." The twenty Federal working day limit described in § 7.33(a) will not begin to run until the appeal has been received by the appropriate office and identified as an appeal under FOIA, or would have been

so identified with the exercise of due diligence, by a DOT employee.

\* \* \* \* \*

9. Amend § 7.34 by revising paragraph (b) to read as follows:

**§7.34 When and how are time limits applicable to DOT extended?**

\* \* \* \* \*

(b) When the extension is for more than ten Federal working days, the written notice provides the requester with an opportunity to either modify the request (e.g., by narrowing the record types or date ranges) so that it may be processed within the extended time limit, or arrange an alternative time period with the DOT component for processing the request (e.g., by prioritizing portions of the request). The written notice also will notify the requester of the right to seek dispute resolution services from the Office of Government Information Services.

\* \* \* \* \*

10. Amend § 7.43 by revising paragraph (f) to read as follows:

**§7.43 When are fees waived or reduced for records requested under subpart C of this part?**

\* \* \* \* \*

(f) Except as provided in paragraphs (f)(1) through (3) of this section, DOT does not assess search fees otherwise chargeable under § 7.42(h) and (j) or duplication

fees otherwise chargeable under § 7.42(i) when DOT fails to comply with the time limits under § 7.31 or § 7.33.

(1) If DOT has determined that unusual circumstances apply (as defined in § 7.34(a)), 5,000 pages or less are necessary to respond to the request, and DOT has provided a timely written notice to the requester in accordance with § 7.34(a), a failure to comply with the time limits under § 7.31 or § 7.33 is excused for an additional 10 days. If DOT does not comply with the extended time limit, DOT does not assess search fees otherwise chargeable under § 7.42(h) and (j) or duplication fees otherwise chargeable under § 7.24(i);

(2) If DOT has determined that unusual circumstances apply (as defined under § 7.34(a)) and more than 5,000 pages are necessary to respond to the request, DOT may charge search fees under § 7.42(h) and (j) or duplication fees under § 7.42(j) if DOT has provided timely written notice to the requester in accordance with § 7.34(a) and (b), and DOT has discussed with the requester via written mail, electronic mail, or telephone (or made not less than three good faith attempts to do so) how the requester could effectively limit the scope of the request.

(3) If a court determines that exceptional circumstances exist (as that term is defined in 5 U.S.C. 552(a)(6)(C)), failure to comply with time limits under § 7.31 or § 7.33 shall be excused for the length of time provided by the court order.

Issued on: April 25, 2017.

---

Judith S. Kaleta,  
Deputy General Counsel.

[FR Doc. 2017-08925 Filed: 5/4/2017 8:45 am; Publication Date: 5/5/2017]